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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

FORUM INTERNATIONAL, LTD., a New York corporation; and PENTHOUSE INTERNATIONAL, LTD., a New York corporation,

Petitioners,

vs.

CHER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS.

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Questions Presented.

1. Does the First Amendment preclude liability for an unauthorized, but admittedly truthful publication concerning a public figure?

2. Does the First Amendment preclude liability for an advertisement which is merely "incidental" to an initial, protected publication, *i.e.* one which does no more than promote the content and quality of the initial publication?

3. May damages for "corrective advertising" under Section 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a), be imposed for publications protected by the First Amendment?

4. May damages under Section 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a), be awarded in the absence of actual consumer confusion?

Parties to the Proceedings Below.

Petitioners Forum International, Ltd. and Penthouse International, Ltd. were defendants and appellants in the proceedings before the Ninth Circuit Court of Appeals below.[1] Fred Robbins, an individual, and News Group Publications, Inc., a Delaware corporation, were also defendants and appellants in those proceedings.

Respondent Cher was the plaintiff and respondent before the Ninth Circuit Court of Appeals.

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[1]Pursuant to Rule 28.1, petitioners' designation of corporate relationships is set forth at p. E33 of the Appendix hereto.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS.

Opinions Below.

The opinion of the Ninth Circuit Court of Appeals is reported at 692 F.2d 634 (9th Cir. 1982), and is set forth at page A1 of the Appendix hereto. The Findings of Fact and Conclusions of Law and Judgment of the District Court are set forth at page B12 of the Appendix hereto, and published unofficially in 7 Med.L.Rptr. 2593 (C.D. Cal. 1982).

Jurisdiction.

The judgment of the Ninth Circuit Court of Appeals was entered on November 18, 1982. A petition for rehearing was timely filed on behalf of petitioners on December 2, 1982 and was denied on January 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

The Constitutional provision at issue is the First Amendment to the United States Constitution which provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The portion of the First Amendment directly in issue is the section pertaining to freedom of speech.

The statutory provision involved is Section 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a), which provides:

> "Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

Existence of Jurisdiction Below.

Jurisdiction in the District Court for the Central District of California was predicated on 28 U.S.C §§ 1331, 1338 (federal question), on 28 U.S.C. § 1332 (diversity of citi-

zenship), on 15 U.S.C. § 1121 with respect to claims under § 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a), and the doctrine of pendent jurisdiction as to state law claims.

Statement of the Case.

The claims of respondent Cher in this case arise out of an accurate, truthful interview with Cher published by Forum International, Ltd. (hereinafter referred to as "Forum") in *Forum* Magazine. Although conceding the truth of the interview as published, as well as her status as a public figure, Cher sought recovery based on an alleged right of an acknowledged celebrity to control the place and manner of publicity which she receives, including the editorial treatment of an interview and the manner and mode of advertisements referring to the publication of that interview.

The dispute began in April 1980, when Cher gave an interview to free-lance interviewer, Fred Robbins (hereinafter referred to as "Robbins"). The interview lasted approximately one and one-half hours, and Cher was friendly and receptive throughout. The following day, Cher spoke with Robbins by telephone in a follow-up interview which lasted twenty to twenty-five minutes.

Prior to the interview, there had been discussions among Robbins, *Us* Magazine and Cher's agent concerning a cover story about Cher to appear in *Us* Magazine. *Us* Magazine had approved Robbins to conduct an interview with Cher for that purpose. Following the interview, Robbins submitted a transcript to *Us* Magazine.

Many months later, *Us* Magazine acquiesced to the request of Cher's agent that it not publish the interview,[2] and returned the interview and all rights in it to Robbins. *Us*

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[2]Apparently, Cher did not feel that the interview sufficiently emphasized her new band.

Magazine also informed Cher's agent that the interview had been returned to Robbins, who was free to do with it as he pleased.

Robbins subsequently contacted Forum and asked if Forum would be interested in purchasing the interview for publication in *Forum* Magazine. Robbins informed Forum that the interview had originally been conducted for publication in *Us* Magazine, which had decided not to run the interview. Since it is common for magazine editors to lose interest in publishing articles and interviews for a variety of reasons, this was not considered unusual or surprising. Forum was informed that Robbins had all rights to sell the interview. No evidence was presented that anyone at Forum knew, or had any reason to know, that any restrictions on Robbins' rights to sell the interview could have existed.

Upon determining that the interview had not previously been published, Forum purchased the interview and ran portions of it in the March 1981 issue of *Forum* Magazine. The cover of the March issue of *Forum* Magazine contained a picture of Cher which was properly purchased for use on the cover from Sygma, an independent photographic agency which owned the photograph. The cover also contained the phrase "Exclusive: Cher Talks Straight".

Subscription advertisements for *Forum* Magazine containing a photograph of Cher and reference to the Cher interview appeared in two issues of *Forum* Magazine and one issue of *Penthouse* Magazine, as well as in various newspapers. In each instance, the right to use the photograph in the advertisement was purchased from Sygma, the owner of the photograph. In addition, a radio commercial for *Forum* Magazine which contained a very minor reference to Forum's

"exclusive" Cher interview was broadcast on various radio stations.[3]

Following publication of portions of the Cher interview by Forum, Fred Robbins sold the transcript to News Group Publications, Inc. (hereinafter referred to as "News Group"), which published other portions of it in two issues of the *Star*. The cover of the first issue contained the words "Exclusive Series".

Subsequent to these publications, Cher filed a complaint in March 1981 in the District Court against Forum, News Group and Robbins. A first amended complaint, filed in April 1981, alleged four causes of action against Forum based on its publications of the interview and advertisements: (1) misappropriation of right of publicity, (2) commercial misappropriation of name and likeness; (3) false description of goods sold in interstate commerce, allegedly constituting unfair competition and a violation of § 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a), and (4) injunctive relief.[4]

Similar causes of action were asserted against News Group based on its subsequent publication of portions of the interview. In addition, causes of action for breach of contract, misappropriation of right of publicity, false description of goods sold in interstate commerce and injunctive relief were asserted against the interviewer, Robbins.

A second amended complaint was filed pursuant to court order on November 23, 1981. The second amended complaint added Penthouse International, Ltd. (hereinafter referred to as "Penthouse") as a defendant in all causes of action directed against Forum, based upon allegations that

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[3]Copies of the subscription advertisements are contained on pages C28, D29 and E30 of the Appendix hereto; a transcript of the radio advertisement is set forth on p. D31 of the Appendix hereto.

[4]The cause of action for injunctive relief was not addressed at trial nor ruled on by the trial court.

Penthouse owns stock in Forum, furnishes staff to Forum and participates in Forum's publishing processes. A court trial commenced three weeks later, on December 15, 1981, and lasted three days.

At trial, Cher conceded the truth and accuracy of the statements attributed to her in the Forum article, but contended that use of the word "exclusive" on the cover of the magazine, and insertion of the name "Forum" in place of the questioner in the body of the article gave rise to the false implication that she gave an interview directly to Forum, and therefore wrongfully invaded her rights. The same claims were made against News Group with respect to the article and headlines used in connection with its publication. Cher also claimed that the use of her name and likeness in reference to the interview in advertisements for *Forum* Magazine was similarly improper.

On January 19, 1982, Findings of Fact and Conclusions of Law and Judgment were entered by the District Court. The District Court held that publication of portions of the interview by Forum without Cher's consent, coupled with the designation of the interview as an "exclusive," constituted a wrongful appropriation of Cher's identity and right of publicity.[5] The same finding was made with respect to News Group's publication. In addition, the District Court held that Forum advertisements referring to the Cher interview also constituted a misappropriation of her name and likeness for advertising purposes, as well as her right of publicity.[6]

Pursuant to the Judgment, Cher was awarded $100,000 in damages jointly against Forum, Penthouse and Robbins,

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[5]*See* Conclusions of Law of the District Court Nos. 4-6, set forth at p. B21 of the Appendix hereto.

[6]*See* Conclusions of Law of the District Court Nos. 5 and 9, set forth at pp. B21, B22 of the Appendix hereto.

purportedly the fair market value of Forum's use of her name and likeness in *Forum* Magazine and the related advertisements. Penthouse was apparently held jointly liable with Forum on the basis of the District Court's finding that Penthouse employees coordinate the circulation efforts of *Forum* magazine. She was also awarded $69,117 jointly against Forum and Robbins pursuant to her Lanham Trademark Act claims, as the alleged cost of a "corrective advertising" campaign.[7] Finally, the trial court awarded $100,000 in punitive damages against Forum.[8]

Following judgment in the trial court, all defendants filed appeals in the Ninth Circuit Court of Appeals. Forum, Penthouse and Robbins asserted that the publication of the interview in *Forum* Magazine constituted a truthful publication concerning a public figure, and was therefore protected under the First Amendment.[9] News Group raised the same claim with respect to its publication. In addition, Forum and Penthouse asserted that advertisements for *Forum* Magazine containing references to the Cher interview were "incidental" to the initial publication, and therefore also protected under the First Amendment.

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[7]This figure represents 25% of the entire advertising budget for the March issue of *Forum* Magazine. The only authority for an award of such damages arises in the unrelated area of commercial trademark infringement.

[8]The remaining elements of the trial court's award were: $169,117 jointly against News Group and Robbins, purportedly the fair market value of News Group's use of Cher's name and likeness; $200,000 in punitive damages against News Group; and $25,000 in punitive damages against Robbins. The trial court did *not* find against Robbins on the breach of contract claim, but held that Robbins had been acting as an agent of *Us* Magazine. Joint and several liability was imposed against Robbins based solely on his sales of the interview to Forum and News Group, which, according to the trial court, rendered him liable for "the consequences of his acts".

[9]Robbins also asserted that, because he had no part in the publication, advertising or marketing of the articles in issue, it was improper to find him jointly and severally liable with Forum or News Group.

Finally, Forum asserted that damages under Section 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a), could not be awarded for a publication protected under the First Amendment nor, in any event, in the complete absence of any showing of actual consumer confusion.

Following an expedited hearing in this matter, the Ninth Circuit Court of Appeals, in its opinion entered on November 18, 1982, held that liability for an article concerning a public figure is protected under the First Amendment unless the publication contains false statements, and was published with knowledge of the falsity or reckless disregard for its truth. The Court of Appeals found that the articles and headlines published by Forum and News Group were not false, and could not form the basis for liability. For this reason, the judgment against News Group was reversed.[10]

The Court of Appeals did not reverse the judgment against Forum or Penthouse, however. Instead, the Court of Appeals upheld the entire award of damages against them, purportedly on the basis of certain advertisements for *Forum* Magazine which contained references to the Cher interview.

In so doing, the Court of Appeals incongruously failed to apply the appropriate First Amendment standards to the article or the advertisements in issue, despite its acknowledgment of those standards, or to correct the District Court's similar failure to do so. In effect, it affirmed the entire damage award made by the District Court, ignoring the fact that the activity on which the District Court predicated that award had been found by the Court of Appeals to be activity protected by the First Amendment.

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[10]The Court of Appeals also vacated judgment against Robbins in its entirety on the grounds that he had no part in the publication, advertising or marketing of the articles in question.

As described in full below, an "incidental" advertisement is one which merely promotes the initial publication by indicating its content and quality. Such an advertisement should, under appropriate First Amendment standards, be similarly protected.

The District Court refused to apply this standard, based in part on its finding that the initial publication of the interview was improper in any event. Accordingly, the District Court made no examination of either the print advertisements or the radio advertisement to determine whether they are "incidental" to the initial publication.[11] Instead, the District Court imposed liability on Forum for the use of Cher's name and likeness in the initial publication of the interview as well as the advertisements on the basis that Cher had not authorized those uses.

The Court of Appeals did not correct the error of the District Court. The Court of Appeals failed to either remand the case to the District Court for an examination of the advertisements under the appropriate standard, or to make an independent examination of the advertisements under the correct standard.

In so doing, the Court of Appeals cursorily reviewed the print advertisements, but made absolutely no examination of the radio advertisement. The radio advertisement in issue contains only a minor reference to the Cher interview in the

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[11]Since the trial court found that the initial publication of the Cher interview was not entitled to First Amendment protection (see Conclusions of Law Nos. 3, 4 and 5 set forth in pp. B20, B21 of the Appendix hereto), it is clear that, in spite of an unsupported alternate conclusion noting that the advertisements were not "incidental", the trial court in fact made no examination of the advertisements in question to determine whether they were protected as "incidental" to the initial publication. The imposition of liability was based solely on the appearance of Cher's name and photograph. (See Findings of Fact Nos. 25-26, set forth at p. B17 of the Appendix hereto).

March issue of *Forum* Magazine. As can be seen from the transcript for that advertisement, set forth in the Appendix, p. D31, the focus of the advertisement is on other features of the magazine generally. The only reference to the Cher interview comes at the very end of the advertisement with the words "In Forum's exclusive interview, you'll also find out why Cher doesn't think that being a sex symbol is enough."

Such a truthful reference in an advertisement for a protected publication is protected activity under the First Amendment. In fact, the Court of Appeals found that the description "exclusive" in reference to both the Forum and News Group publication was truthful. The imposition of liability for the radio advertisement violates First Amendment guarantees applicable to "incidental" advertising. The award of damages for the radio advertisement is particularly egregious since the radio advertisement constituted the major portion of Forum's March 1981 advertising budget, and was thus the major component of the award of damages for so-called "corrective advertising" discussed *infra*.

Thus, no examination of *any* of the advertisements in issue was made to determine whether they went beyond an incidental, protected use. Forum is entitled to a review of the advertisements in issue under the appropriate First Amendment standard prior to the imposition of liability, as well as a determination that liability may not be imposed at all for its initial protected publication of the interview. The opinion of the Court of Appeals in failing to conduct, or order the conduct of, such an examination, and in allowing to stand the District Court monetary judgment which punished activity that the Court of Appeals had found to be protected, resulted in the affirmance of a punitive award imposed directly on protected First Amendment activity.

Furthermore, the Court of Appeals erroneously upheld the imposition of liability under Section 43(a) of the Lanham Trademark Act, although it specifically declined to address that issue, and although such liability was also imposed by the District Court on publications entitled to First Amendment protection under the Court of Appeals decision. Forum and Penthouse similarly seek review of the erroneous liability standard imposed by the District Court under that Act.

In sum, in upholding the District Court's judgment, the Court of Appeals upheld a damage award of over $269,000, including an award for the initial publication of the article (which the Court of Appeals expressly found to be protected), for the *radio* advertisement (which was never examined by the Court of Appeals and examined only under an incorrect standard by the District Court), and for the print advertisements (which had never been examined by the trial court or the Court of Appeals under the appropriate First Amendment standard).

Following entry on the opinion of the Court of Appeals, a petition for rehearing was filed by Forum and Penthouse, and denied as set out above.

REASONS FOR GRANTING THE WRIT.

I.

The Imposition of Liability for a Publication Protected by the First Amendment Conflicts With Applicable Standards of This Court and Severely Chills the Exercise of First Amendment Rights.

The Court of Appeals has affirmed the imposition of a huge monetary liability on Forum and Penthouse for an admittedly truthful, accurate publication concerning a public figure, which it found to be protected activity, as well as advertisements which are merely incidental to that initial publication. This decision so far departs from applicable decisions of this Court, and so severely penalizes Forum for its exercise of rights protected by the First Amendment, as to warrant review by this Court.

As set out above, liability was imposed on Forum and Penthouse for the use of Cher's name and likeness in connection with a truthful, accurate account concerning Cher, an admitted public figure. Such an award is in direct conflict with the standard set forth by this Court in the leading case of *Time, Inc. v. Hill*, 385 U.S. 374, 384-386 (1967), and numerous cases thereafter: *i.e.*, in the absence of falsehoods no recovery can be had by a public figure for use of the public figure's name and likeness in a news account. Thus, in the case of an article concerning a public or newsworthy figure, truth is a complete defense. *Id.* at 383.

Indeed, the Court of Appeals recognized this as the appropriate standard, and stated that it could not uphold the trial court's finding of liability against Forum on the basis of the publication of the article and headlines. In spite of the lip service given by the Court of Appeals to this standard, however, the Court of Appeals upheld in their entirety the damages awarded by the District Court. Those damages

were based in large part on this protected publication of the Cher article by Forum. Thus, the Court of Appeals completely failed to apply the appropriate First Amendment standard to the Forum article.

The Court of Appeals further erred by failing to examine, or direct the trial court to examine, the print and radio advertisements in issue under the appropriate First Amendment standards. Advertisements which use a person's name or likeness to advertise a periodical in which they originally appeared are considered "incidental" to the original use and similarly protected under the First Amendment. *See, e.g., concurring op.* in *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 872-873, 160 Cal.Rptr. 352 (1979).

Namath v. Sports Illustrated, 80 Misc.2d 531, 363 N.Y.S.2d 276 (1975), *aff'd*, 39 N.Y.2d 897 (1976) illustrates this point. In that case, a star football player sought recovery from a magazine for its use of his name and photograph in advertisements promoting subscriptions to the magazine and referring to an article about him. Plaintiff had not authorized the appearance of his name or photograph in either the magazine or the advertisements, but conceded, unlike Cher, that as a newsworthy figure, no objection could be made to their appearance in the magazine.

The court found that the use of a person's name or photograph to advertise a periodical in which they originally appeared is "incidental" to the original use and similarly protected. Namath's claims, almost identical to those of Cher, were that "the makeup of the advertisements, the prominent use of plaintiff's name, the superimposed wording and the accompanying copy" took the advertisements out of the realm of an "incidental" use and rendered them actionable. The court rejected this contention, finding that the concept of incidental use encompasses this type of use in advertisements for the protected medium where it orig-

inally appeared. The court in *Namath* distinguished cases where liability would be imposed as involving use of a person's name or image to advertise a product which is unrelated to an earlier, protected use.[12] *See, also Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 574, n.11.

Accordingly, once it is recognized that publication of Cher's interview is Constitutionally protected, Forum likewise has the right to advertise its magazine by references to its contents. The District Court completely failed to recognize or apply this standard because, as a threshold matter, it refused to recognize First Amendment protection for Forum's initial publication.

The Court of Appeals failed to correct this error by the District Court. Indeed, it in effect compounded that error by finding the initial publication protected, but failing to acknowledge that the District Court's subsequent finding as

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[12]To the same effect, *i.e.*, that advertisements for a medium containing references to a plaintiff are protected to the same extent as were the references in the medium itself, are *Leopold v. Levin*, 45 Ill.2d 434, 259 N.E.2d 250, 256 (1970) and *Koussevitsky v. Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N.Y.S.2d 779, 784 (1947), *aff'd.*, 272 App. Div. 759. Both of these cases were cited approvingly in the concurring opinion by C.J. Bird in *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal.3d at 872-873, the only California case specifically addressing this issue, where she states:

> "A similar result is compelled for the use of Valentino's name and likeness in advertisements for the film. That use was merely an adjunct to the exhibition of the film. It was not alleged that the advertisements promoted anything but the film. Having established that any interest in financial gain in producing the film did not affect the constitutional stature of respondents' undertaking, it is of no moment that the advertisements may have increased the profitability of the film. It would be illogical to allow respondents to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise. Since the use of Valentino's name and likeness in the film was not an actionable infringement of Valentino's right of publicity, the use of his identity in advertisements for the film is similarly not actionable." [Citations omitted.]

to the advertisements had flowed directly from that initial error and that the District Court damage award was similarly tainted.

The Court of Appeals did note that an advertisement for a protected publication which is "incidental" to the initial publication, *i.e.*, one which describes its content and quality, is similarly protected. The Court of Appeals did *not*, however, remand the matter to the District Court for an examination of the advertisements to determine whether they were "incidental" to the initial protected publication, nor did the Court of Appeals make such an examination itself, or vacate the damage award which admittedly had been predicated on activity found protected by the Court of Appeals.

Rather, the Court of Appeals found that there was "sufficient evidence" to allow the trier of fact to find that the print advertisements were published with knowledge of their falsity or reckless disregard for their truth. The trier of fact did *not* so find, however. Rather, the trial court had imposed liability on Forum for both the article and the advertisements on the grounds that use of Cher's name and likeness therein was unauthorized, and their mere use conveyed the impression that she had given an interview directly to Forum.[13] No examination of the advertisements was ever made under the appropriate First Amendment standard, by either the District Court or the Court of Appeals.

Accordingly, the within writ should be granted in order that this Court may review the imposition of liability for the publication of an article and related advertisements which are clearly entitled to First Amendment protection.

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[13]*See, e.g.*, Conclusions of Law numbers 4 and 5, at p. B20 of the Appendix hereto.

II.

The Imposition of Damages for "Corrective Advertising" Under § 43(a) of the Lanham Trademark Act for Publications Protected by the First Amendment Severely Inhibits the Exercise of First Amendment Rights.

The District Court below awarded respondent Cher the sum of $69,117 as the supposed cost of a "corrective advertising" campaign "to inform the public that the usages by defendants were wrongful and of the true facts". The trial court based this award on its finding that Forum had violated Section 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a), under which liability may arise for "a false description or representation."[14] The trial court calculated its award by taking 25% of the entire advertising budget for the March issue of *Forum* Magazine, and cited as precedent a case involving liability for egregious trademark infringement, *Big O Tire Dealers v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365 (10th Cir. 1977).

The Court of Appeals specifically declined, however, to reach the issue of liability under the Lanham Trademark Act in its opinion (see p. B23 of the Appendix hereto). Nonetheless, the Court of Appeals let stand this award of damages, and thus approved the imposition of liability under the Lanham Trademark Act.

A publication which is protected by the First Amendment cannot form the basis for a claim for libel or, indeed, for any other claim. A contrary standard would severely inhibit the exercise of First Amendment rights as demonstrated above. Accordingly, the within writ should be granted in

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[14]*See*, Conclusions of Law numbers 12 and 13, p. B23 of the Appendix hereto.

order that this Court can determine whether liability under the Lanham Trademark Act may be imposed for publications which are otherwise protected by the First Amendment.

III.

Imposition of Damages Under Section 43(a) of the Lanham Trademark Act Is Improper in the Absence of a Showing of Actual Consumer Confusion, and This Important Issue of Federal Law Should Be Settled by This Court.

Even assuming, *arguendo*, that either the publication of the interview or any of the advertisements was not protected by the First Amendment, the award of damages under Section 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a), is improper because Cher did not establish that the Forum interview or advertisements actually deceived or confused a portion of the buying public.

In circuits other than the Ninth Circuit, it has been established that, although injunctive relief, the usual and contemplated remedy under Section 43(a) of the Lanham Trademark Act, may be granted merely upon a showing that a false advertisement has a tendency to deceive, a plaintiff can recover damages under the Act only by a showing that the falsification actually deceived a portion of the buying public. *Parkway Baking Co. v. Friehofer Baking Co.*, 255 F.2d 641, 648 (3d Cir. 1958). A showing that the false advertisement or representation has only a tendency to deceive is an insufficient basis for an award of damages. *Walker-Davis Publications, Inc. v. Penton/IPC, Inc.*, 509 F.Supp. 430, 436 (E.D. Pa. 1981).

To prove actual consumer confusion, the courts have generally required survey evidence or similar evidence that particular consumers were misled or confused by the false advertising. For instance, in *D.C. Comics, Inc. v. Filmation*

Associates, 486 F.Supp. 1273 (S.D.N.Y. 1980), a marketer of comic books brought suit under the Lanham Trademark Act against the creator of two animated television series which featured characters similar to those in its comic books. The court held that a plaintiff seeking damages for violation of the Lanham Trademark Act may not recover without proof that "consumers who wished to buy plaintiff's product were actually misled into buying defendant's, or at least that consumers were actually confused as to the origin of the products." *Id.* at 1279. The court concluded that the plaintiff had not met this burden, finding no evidence as to the reactions or attitudes of purchasers or readers of comic books. *Id.* at 1279-80. The only evidence of actual consumer confusion was testimony regarding a single incident of confusion, which was not sufficient to support an inference of actual confusion of the viewing public in general, or of the audience of comic books and toys and games. *Id.* at 1280.

Similarly, the court in *Perfect Fit Industries, Inc. v. Acme Quilting Co., Inc.*, 618 F.2d 950, 955 (2d Cir. 1980), concluded that plaintiff failed to make out a case for monetary relief in its claim that defendant had deliberately copied its new line of mattress pads. *Id.* at 955. Although the record supported injunctive relief against the defendant, the plaintiff had failed to show at trial that the similarities in the products resulted in actual consumer confusion.

> "Even had Perfect Fit adduced admissible evidence of confusion on the part of retailers, however, such evidence would not have shown actual confusion of the public but only the likelihood of such confusion. In the absence of proof of actual confusion of consumers, Perfect Fit is not entitled to damages or an accounting."

Id. at 955. (Citations omitted, emphasis added.)

In sum, a plaintiff seeking money damages under the Lanham Trademark Act is normally required to demonstrate

actual consumer confusion by evidence of consumer surveys or evidence of specific instances in which particular consumers were confused or deceived. Such an interpretation is supported by the history of Section 43(a) of the Lanham Trademark Act in which injunctive relief is clearly the normal remedy contemplated, which could be awarded upon a showing that a false advertisement had a tendency to deceive. Appropriately, however, all circuits which have addressed the issue have found that evidence of actual consumer confusion is required to justify an award of damages.

Cher failed to present any such evidence at trial. Accordingly, the trial court's award of damages under Section 43(a) of the Lanham Trademark Act should be reversed. Review of this Court is also sought in order that the appropriate standard for an award of damages under Section 43(a) of the Lanham Trademark Act may be established.

Conclusion.

For these reasons, a writ of certiorari should issue to review the opinion of the Ninth Circuit Court of Appeals.

DATED: April 18, 1983.

Respectfully submitted,

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APPENDIX A.

Opinion.

Cher, Plaintiff-Appellee, v. Forum International, Ltd., a New York corporation, dba Forum Magazine; Penthouse International, Ltd., a New York corporation; News Group Publications, Inc., a Delaware corporation, dba the Star; Fred Robbins, an individual, Defendants-Appellants. Nos. 82-5105, 82-5106, 82-5107.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 3, 1982. Decided Nov. 18, 1982.

Celebrity brought action against free-lance writer who had conducted an interview with her and against magazines which had published the interview. The United States District Court for the Central District of California, Manuel L. Real, J., entered judgment on verdict in favor of celebrity and magazines and writer appealed. The Court of Appeals, Goodwin, Circuit Judge, held that: (1) writer who had made no promises of interviewee approval rights and who had not participated with the publishers could not be held liable; (2) celebrity was not damaged by one magazine's assertedly exaggerated claims of exclusivity; (3) magazines were entitled to inform their readers that various issues contained articles about the celebrity; but (4) magazine appropriated right of publicity by falsely indicating that celebrity had told it things that she would not tell a rival magazine and by falsely indicating that she endorsed the magazine; and (5) magazines could be held liable in punitive as well as special and general damages.

Affirmed in part, modified in part, and reversed in part.

N. Roy Grutman, New York City, argued for Forum Intern., Ltd. and Fred Robbins; Paul, Hastings, Janofsky & Walker, Los Angeles, Cal., on brief.

Louis P. Petrich, Los Angeles, Cal., argued for Penthouse Intern., Ltd.; Youngham, Hungate & Leopold, Los Angeles, Cal., on brief.

John D. Forbess, Rudin, Perlstein & Chieffo, Beverly Hills, Cal., for Cher.

Appeal from the United States District Court for the Central District of California.

Before CHAMBERS and GOODWIN, Circuit Judges, EAST,* District Judge.

GOODWIN, Circuit Judge.

A well-known entertainer who performs under the name "Cher" sued a number of defendants for damages allegedly arising out of the unauthorized publication in two magazines of portions of an interview that she had given to a writer for a third, which did not use it. A court trial resulted in judgment for compensatory and punitive damages against all defendants. They appeal.

This controversy began when Fred Robbins taped an hour-and-a-half interview with Cher in Atlantic City. Robbins is a radio talk show host who interviews celebrities and sells the interviews, or parts of them, to as many magazines as possible. Robbins and Cher understood that the taped interview was to be published in *Us* magazine. Cher and her agents were apparently interested in having a cover story in that magazine, timed to reach the public about the same time Cher expected to release a new album.

The editors of *Us* magazine, at Cher's request, did not run the interview, and returned it to Robbins, paying him a "kill" fee. Cher apparently did not feel that the interview sufficiently emphasized her new band. Robbins sold the

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

interview to two of the defendants, the publishers of a tabloid called *Star*, and the publishers of a pocket-sized magazine called *Forum*.

Cher does not allege that the published text of the interview was false or defamatory. Nor does she contend that private facts were published without her consent. Instead her complaint charged breach of contract, unfair competition, misappropriation of name and likeness, misappropriation of right to publicity, and violations of the Lanham Act,[1] all with reference to the publishers' use of headlines, cover promotions and advertising in connection with the interview.

The trial court found for Cher and awarded general and punitive damages against all defendants. The court indulged in the regrettable practice of asking the winning lawyers to draw the findings of fact; so we do not know what the trial court would have said in its own words. We therefore give the findings special scrutiny. *United States v. State of Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981), *cert. denied*, ... U.S. ...., 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982); *Photo Electronics Corp. v. England*, 581 F.2d 772, 777 (9th Cir. 1978). After examining the record, we conclude that the evidence does not support the findings in their entirety, and the law does not support parts of the judgment.

(1) Fred Robbins

Robbins taped the interview with Cher with her consent and cooperation. She now says she gave that consent under the mistaken belief that the interview would appear as a cover story in *Us* magazine and that she did not consent to other uses of the interview. The trial court found that Cher

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[1]We decide the case on grounds other than the Lanham Act and therefore express no opinion on its applicability to these facts.

had no contract with Robbins. We accept that finding. Moreover, it was stipulated that Robbins had never promised any interviewee approval rights over an interview. Accordingly, any liability of Robbins to Cher must be predicated upon a finding that Robbins participated in one or more of the tortious actions of the publisher defendants.

Robbins had no part in the publishing, advertising or marketing of the articles in question. Accordingly, the judgment against Robbins is clearly erroneous and must be vacated.[2]

(2) News Group Publications, Inc.

News Group Publications, Inc. publishes, among other things, a tabloid called *Star*. *Star* published portions of the Robbins interview in its March 17 and 24, 1981, issues and printed Cher's picture and these words on its March 17 cover: "Exclusive Series", followed by "Cher: My life, my husbands and my many, many men."

Cher's theory against News Group was that her image as a major celebrity was degraded by the suggestion that she would give an exclusive interview to that publication. Cher also claimed that News Group had wrongfully appropriated Cher's implied endorsement of *Star* for commercial purposes.

We note first that it was stipulated that "exclusive" interviews with Cher had previously appeared in *Star* a number of times. We also note that Cher conceded at trial that she had never been paid for an interview, and that *Star* had never paid an interviewee for an interview. Whether the article itself was an "exclusive," it was stipulated that the *Star* article had not previously appeared in any other pub-

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[2]Robbins also asserts that the court lacked personal jurisdiction over him. It is not necessary for us to address this argument in view of our disposition on the merits.

lication. Even if some of the material in *Star* had already appeared in *Forum*, Cher did not suffer any damage from *Star's* exaggerated claims of exclusivity.

Star bought an interview with a public figure from a free-lance writer and published portions of it. This activity is protected by the First and Fourteenth Amendments in the absence of a showing that the publishers knew that their statements were false or published them in reckless disregard of the truth. *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L.Ed.2d 456 (1967). Cher makes no claim that *Star* published any statements from the interview with knowledge that they were false or with reckless disregard for their truth.

Cher's theory was that by using the words "Exclusive Series" and "Cher: My life, my husbands and my many, many men" on the cover of *Star*, the magazine was falsely representing to the public that Cher had given *Star* an exclusive interview.

Star was entitled to inform its readers that the issue contained an article about Cher, that the article was based on an interview with Cher herself, and that the article had not previously appeared elsewhere. It sought to do so by the use of words, including "Exclusive Series." The use of these words cannot support a finding of the knowing or reckless falsity required under *Time, Inc. v. Hill*.

Neither do the words in question constitute a false claim that Cher endorsed *Star* magazine. There is no evidence in the record to support such a theory. The district court in effect imposed liability on the basis of earlier negotiations between Cher and News Group relating to a contract for commercial advertising and Cher's endorsement of *Star*, to be aired on television. These negotiations were never concluded, and were not relevant in this case, where no endorsement was in fact shown.

The California statute governing the use of another's name or likeness for commercial purposes contains an express exception for news accounts. Cal.Civ.Code § 3344(d).

The California Supreme Court has subjected the "right of publicity" under California law to a narrowing interpretation which accords with First Amendment values. The Court has acknowledged that "the right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity." *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 873, 160 Cal.Rptr. 352, 359-360, 603 P.2d 454, 461-462 (1979) (Bird, J. concurring.) Cher has no claim based on *Star's* publication and exploitation of her interview with Robbins.

The judgment against News Group is reversed.

(3) Forum International, Ltd.

Forum International, Ltd., a New York corporation, published part of the Robbins interview in the March 1981 issue of *Forum*, identifying Robbins as the interviewer but changing the text so that *Forum* appeared as the poser of questions and Cher appeared as the respondent (apparently a common practice in the industry). The magazine printed Cher's picture on its cover with the words: "Exclusive: Cher Talks Straight." *Forum* also caused to be published advertising copy referring to Cher which is discussed below. Cher sued Forum International on two theories; (1) falsely creating and exploiting the impression that Cher had in fact given an exclusive interview directly to *Forum* when she had not; and (2) exploiting Cher's celebrity value to sell magazines without her consent by implying that she endorsed *Forum*.

Cher concedes that *Forum's* publication of the interview was protected by the First Amendment. As explained above with reference to News Group, this protection extends to *Forum's* use of headlines and cover display so long as the headlines and promotional devices were true or were not published with knowledge that they were false or in reckless disregard for their truth. It was stipulated that the photos used by *Forum* were purchased from an independent agency which owned them. Unlike *Star*, however, *Forum* also engaged in explicit advertising using Cher's name and picture. This advertising provided an alternate basis for liability.

Forum carried inside its March 1981 issue a subscription "tear out" opposite the following legend: "There are certain things that Cher won't tell People and would never tell Us. She tells Forum." This message was printed above a picture of Cher. The text of the ad included the following sentence: "So join Cher and FORUM's hundreds of thousands of other adventurous readers today."

The same legend and picture were used in an ad appearing in the February 1981 issue of *Penthouse*. The text of that ad included the sentence: "So take a tip from Cher and hundreds of thousands of other adventurous people and subscribe to Forum."

Forum was also the beneficiary of a display advertisement in the *New York Daily News* on February 18, 1981, which, next to her picture, stated: "Cher Never Told Anyone How She Played Kiss and Tell with Rock Star Gene Simmons . . . She Told Forum Magazine." The court found that both Forum International and Penthouse International participated in concocting and placing the above described advertising copy and concluded that they were liable for falsely implying that Cher had endorsed *Forum*.

California law permits recovery for the unauthorized use of one's likeness or name for commercial purposes. *Gug-*

lielmi, supra; Lugosi v. Universal Pictures, 25 Cal.3d 813, 160 Cal.Rptr. 323, 603 P.2d 425 (1979); *Fairfield v. American Photocopy Equipment Co.,* 138 Cal.App.2d 82, 291 P.2d 194 (1955); Cal.Civ.Code § 3344. No action under this theory will lie, however, solely for publication which is protected by the First Amendment.

Constitutional protection extends to the truthful use of a public figure's name and likeness in advertising which is merely an adjunct of the protected publication and promotes only the protected publication. *Guglielmi,* 160 Cal.Rptr. at 360, 603 P.2d at 462. Advertising to promote a news medium, accordingly, is not actionable under an appropriation of publicity theory so long as the advertising does not falsely claim that the public figure endorses that news medium. *Namath v. Sports Illustrated,* 48 A.D.2d 487, 371 N.Y.S.2d 10 (1975), *affirmed,* 39 N.Y.2d 897, 386 N.Y.S.2d 397, 352 N.E.2d 584 (1976), (no violation of right to publicity where magazine uses picture of celebrity who had previously appeared in magazine in subscription advertisement with heading "How to get Close to Joe Namath"). *Forum* would have been entitled to use Cher's picture and to refer to her truthfully in subscription advertising for the purpose of indicating the content of the publication, *Guglielmi, supra,* because such usage is protected by the First Amendment. But *Forum* was not content with honest exploitation of the fact that it possessed some pictures of Cher and an interview that she had given a writer. *Forum* falsely proclaimed to the readers of its advertising copy that Cher "tells *Forum*" things that she "would never tell *Us.*" In view of the fact that Cher had intended to "tell" the rival magazine, *Us,* the very words in the interview, and had not "told" *Forum* anything, the advertising copy was patently false. This kind of mendacity is not protected by the First Amendment, and those defendants responsible for the placement and circu-

lation of the challenged advertising copy must look elsewhere for their protection.

The trial court found in effect that *Forum* or *Penthouse* published the ads in question with knowledge that they were false or in reckless disregard for their truth. Cher maintains that *Forum* falsely stated that Cher had actually endorsed that magazine. *Forum* contends that the statements which form the basis of Cher's complaint are vague and subject to numerous interpretations. For example, "So join Cher and FORUM's hundreds of thousands of other adventurous readers today" may readily be interpreted in several ways. The reader may understand this as an invitation to enjoy reading about Cher along with other readers or to read about Cher and other readers in *Forum*, which as a regular feature prints a large number of letters from readers. Similarly, "so take a tip from Cher . . ." is equivocal and could be interpreted to refer to what the reader will learn from reading about Cher in *Forum* magazine. Cher's own expert admitted that the other language in the ads — *e.g.*, "There are certain things that Cher won't tell People and would never tell Us. She tells Forum" — does not constitute an express endorsement. Nevertheless, the trier found that there was an implied endorsement of *Forum* in the words of the advertisement.

Because of the First Amendment implications in this case, we have examined the trier's findings with the extra care required in such cases. We are satisfied that the trier could find, from the record as a whole, that no matter how carefully the editorial staff of *Forum* may have trod the border between the actionable and the protected, the advertising staff engaged in the kind of knowing falsity that strips away the protection of the First Amendment. Whether we agree with the trier's finding of knowing falsity, or fall back a

step to reckless disregard for the truth, there is enough evidence to support the material findings under Fed.R.Civ.P. 52 against Forum International, Ltd.

(4) Penthouse International, Ltd.

Cher's theory against Penthouse International was based on two aspects of Penthouse International's involvement with Forum International: (1) Penthouse International owns 80% of the stock of Forum International; and (2) *Penthouse's* staff participated in the preparation of the advertisements which appeared in *Forum* and in *Penthouse*. For the same reasons that we sustain the trier's material findings against Forum International, we sustain the findings against Penthouse International. There was enough participation in the false advertising to permit Penthouse International to share Forum International's liability.

The remaining questions have to do with the measure of damages.

The challenged judgment provides that Cher:

(1) recover of defendants Forum International, Ltd., Penthouse International, Ltd., and Fred Robbins, jointly and severally, as special damages, the sum of $100,000, with interest;

(2) recover of defendants Forum International, Ltd. and Fred Robbins, jointly and severally, as general damages, the additional sum of $69,117, with interest;

(3) recover of defendant Forum International, Ltd., as exemplary damages, the additional sum of $100,000, with interest;

(4) recover of defendants News Group Publications, Inc. and Fred Robbins, jointly and severally, as special and general damages, the additional sum of $169,117, with interest;

(5) recover of defendant News Group Publications, Inc., as exemplary damages, the additional sum of $200,000, with interest;

(6) recover of defendant Fred Robbins, as exemplary damages, the additional sum of $25,000, with interest; together with costs against all defendants jointly and severally.

Because Fred Robbins did not participate in the activities found by the trial court to be wrongful, all portions of the judgment against Robbins are vacated.

We find no substantial flaw in the manner in which the trier found general and special damages against Penthouse International and Forum International. Accordingly, those parts of items (1) and (2) which impose general and special damages against Penthouse International and Forum International, with interest from January 15, 1982, at seven percent, are affirmed.

Some exemplary damages can be supported as punishment for the false advertising and promotional misrepresentations of those defendants. In view of the dollar amounts that were discussed in the evidence concerning situations when celebrities agree to commercialize their publicity value, we cannot say that the trier's assessment of $100,000 exemplary damages in item (3) against Forum is clearly erroneous.

All portions of the judgment against News Group Publications, Inc., are vacated.

Reversed in part, affirmed in part, and modified in part.

APPENDIX B.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Cher, Plaintiff, v. Forum International, Ltd., a New York corporation, dba Forum Magazine; Penthouse International, Ltd., a New York corporation; News Group Publications, Inc., a Delaware corporation, dba the Star; Fred Robbins, an individual, Defendants. No. 81 1461 R.

Filed: January 15, 1982.

This action having been tried upon the facts by the Court without a jury, the Court does hereby find the facts and state separately its conclusions of law thereon, and directs the entry of the appropriate judgment, as follows:

FINDINGS OF FACT

1. Plaintiff Cher is a resident and citizen of California, residing within the Central District.

2. Defendant Fred Robbins (hereinafter referred to as "Robbins") is a citizen of New York.

3. Defendant Forum International, Ltd. (hereinafter referred to as "Forum") is a New York corporation. Forum publishes a monthly magazine entitled *Forum* Magazine, which is sold and distributed in interstate commerce and in the Central District of California.

4. Defendant Penthouse International, Ltd. (hereinafter referred to as "Penthouse") is a New York corporation. Penthouse is the parent corporation of Forum through a series of corporate ownerships. Penthouse publishes a magazine entitled *Penthouse* Magazine, which is sold and distributed in interstate commerce and in the Central District of California.

5. Defendant News Group Publications, Inc. (hereinafter referred to as "News Group") is a Delaware corporation. News Group publishes a weekly tabloid entitled the *Star*, which is sold and distributed in interstate commerce and in the Central District of California.

6. The amount in controversy in the within dispute is in excess of $10,000.

7. Cher is a well-known entertainer and has performed publically for many years as a singer, recording artist, television personality and entertainer. There is a great deal of interest by the public worldwide in the events of Cher's life. Cher has exploited and licensed to others the right to exploit her name, likeness and personality, and received compensation therefor. Cher has created a substantial public identification of her as a personality, a substantial goodwill and secondary meaning with the public, and a substantial commercial value in her name, likeness, personality and endorsement of products. The name and likeness of Cher and the single name "Cher" have come to be known and associated with plaintiff Cher and are readily identifiable with Cher and with her services as an entertainment personality.

8. In or before April, 1980, Cher, through her representatives, agreed with *US* Magazine to participate in a personal interview to be published as an exclusive cover story in *US* Magazine.

9. *US* Magazine assigned Robbins to conduct the interview of Cher for *US* Magazine and agreed to pay Robbins for conducting the interview. The idea for the interview of Cher for *US* Magazine did not originate with Robbins, but, rather, from discussion between Cher's agents and *US* Magazine.

10. As part of the agreement between Cher and *US* Magazine, it was agreed and understood by Cher, *US* Mag-

azine, and Robbins, that it was a material condition of Cher's agreeing to give such interview that the interview appear as a cover story in *US* Magazine, that the interview was being given by Cher on the express condition that it appear only in *US* Magazine, and in no other publication at any time. Robbins, in conducting the interview, was acting in a capacity as an agent of *US* Magazine rather than in any capacity of a freelance journalist.

11. On or about April 4, 1980, Robbins conducted a tape recorded interview for *US* Magazine with Cher in Atlantic City (the "Interview"), and Robbins caused to be prepared a transcript of the Interview. In conducting said Interview, Robbins was acting in the capacity of an agent of *US* Magazine rather than as a freelance writer, and Robbins was aware that he was acting in such capacity.

12. Following the Interview, Cher notified *US* Magazine that she did not approve of the Robbins' Interview and requested that a new interview be conducted. *US* Magazine agreed not to publish the Robbins' Interview and a new interview was conducted and published in *US* Magazine.

13. Robbins was aware that Cher had requested of *US* Magazine that *US* Magazine not publish the Robbins' Interview, and Robbins was aware that *US* Magazine had agree to Cher's said request. Robbins requested permission from Cher to broadcast the Interview on his radio show, and Cher's permission was denied. However, Robbins did broadcast portions of the Interview on his radio show on four separate occasions after his request to Cher had been denied.

14. Notwithstanding any purported release of rights by *US* Magazine to Robbins, Robbins knew of the conditions imposed by Cher under which she agreed to give the inter-

view, and that any publication other than in *US* Magazine would require Cher's consent.

15. After Robbins was notified by *US* Magazine that it would not publish the Interview and returned the interview to him, Robbins sold the Interview to Forum for publication in *Forum* Magazine. Robbins informed Forum that the Interview had been done originally for *US* Magazine.

16. At no time did Robbins contact or attempt to contact, in any manner, Cher or any of her representatives, to seek her consent, release or authorization to sell the Interview, or any portion thereof, to any publication other than *US* Magazine.

17. At no time did Forum or Penthouse contact, or attempt to contact, in any manner, Cher, or any of her representatives, to seek her consent, release or authorization for Forum to publish the Interview, or any portion thereof, in *Forum* Magazine as an exclusive interview to Forum.

18. Robbins submitted to Forum the entire transcript of the Interview, and Forum edited and altered the text of the transcript by designating "FORUM:" as the poser of questions and "CHER:" as the responder. *Forum* Magazine was not the poser of questions a the original Interview.

19. Penthouse employees coordinate all circulation efforts of *Forum* Magazine and prepare and cause to be published all advertisements for *Forum* Magazine, and did so in this instance. All circulation and advertising efforts of Penthouse are approved and authorized by Forum and each such effort in this instance was so authorized and approved.

20. In or about February, 1981, Penthouse and Forum caused to be created and placed for publication a newspaper advertisement advertising the purchase of *Forum* Magazine, which utilized Cher's name and likeness (hereinafter referred to as the "Newspaper Advertisement"). Said Newspaper Advertisement was placed and published in excess of

one hundred times in at least twenty-seven newspapers around the United States and in Canada.

21. In or about February, 1981, Penthouse and Forum caused to be created and placed for broadcast, a radio advertisement advertising *Forum* Magazine and utilizing Cher's name (hereinafter referred to as the "Radio Advertisement"). Said Radio Advertisement was placed and broadcast in excess of seven hundred times over at least one hundred radio stations around the United States.

22. In or about February, 1981, Penthouse, and Forum caused to be created and placed for publication, a subscription advertisement for *Forum* Magazine which utilized the name and likeness of Cher, and express words and of endorsement by Cher of *Forum* Magazine, which subscription advertisement was published in the February, 1981, and the March, 1981, issues of *Penthouse* Magazine (hereinafter referred to as the "Penthouse Subscription Advertisement").

23. In or about February, 1981, Penthouse and Forum caused to be created and placed for publication an advertisement for subscriptions to *Forum* Magazine, which utilized the name and likeness of Cher, and express words of endorsement by Cher of *Forum* Magazine, which subscription advertisement was published in the February, 1981, anx the March, 1981, issues of *Forum* Magazine (hereinafter referred to as the "Forum Subscription Advertisement").

24. Forum paid the sum of $65,745 for the Newspaper Advertisements and $143,123 for the Radio Advertisements for the March, 1981 issue of *Forum* Magazine, utilizing the name and likeness of Cher. If Forum were required to pay for the Penthouse Subscription Advertisement and the Forum Subscription Advertisement, it would have been required to pay the sums of $30,000 and $3,800 respectively for each

usage. The total advertising cost for advertisements utilizing the name and/or likeness of Cher was $276,468.

25. Forum and Penthouse caused all of the above-described advertisements to be published and broadcast without the consent of Cher, and Forum and Penthouse knew that Cher had never so consented. No efforts of any kind were made by Forum or Penthouse to seek consent, release or authorization from Cher or any of her representatives for such usages.

26. The words, usages and configurations on the *Forum* Magazine cover, in the interview and in the advertisements are false and misleading in that they directly stated and would convey the impression to at least a substantial number of readers of *Forum* Magazine and of the advertisements described above that Cher chose to and did give an exclusive interview directly to *Forum* Magazine, when, in fact, she did not; that Cher endorses, approves and recommends the purchase of *Forum* Magazine, when, in fact, she does not; and that she is a reader and a satisfied reader of *Forum* Magazine, when, in fact, she is not.

27. The intent, design and purpose of Forum's and Penthouse's advertisements utilizing Cher's name and likeness was to trade upon and commercially exploit Cher's name, likeness, public recognition and public identification in order to induce the public to purchase *Forum* Magazine; to use Cher's name and likeness as an "attention getter" for said advertisements and thereby increase their value to Forum and Penthouse; and to create for Forum's and Penthouse's commercial benefit, an identification between Cher and *Forum* Magazine.

28. Penthouse and Forum caused the subject cover, article and advertisements to be published with actual knowl-

edge of their falsity and with actual knowledge that their usages were not authorized by Cher.

29. The usages by Forum and Penthouse in publishing the cover and article in the March, 1981 issue of *Forum* Magazine and in publishing the subject advertisements, were a willful, knowing and intentional misappropriation of Cher's name and likeness, willful and knowing false statements of facts, and a blatant violation and conscious disregard for the rights of Cher.

30. The fair market value of the right to use Cher's name and likeness in the manner in which use was made herein by Forum and Penthouse is $100,000.

31. In or about February, 1981, News Group, aware of the existence of the Forum article, solicited from Robbins the purchase of the Interview. Thereafter, Robbins sold the Interview to News Group for use as a two-part series of interviews in the *Star*.

32. No representative of News Group had any contact or attempted to make any contact in any manner with Cher or her representatives prior to publication of the article in the *Star*, to seek her consent, release or authorization for the *Star* to publish the Interview or any portion thereof in the *Star*.

33. The words, usages and configurations in the March 17, 1981 cover and article and the March 24, 1981 article in the *Star* are false and misleading in that they stated and would convey the impression to at least a substantial number of readers of the *Star* and to members of the public viewing the cover of the *Star*, that Cher chose to and did give an exclusive series of interviews about her life directly to the *Star* when, in fact, she had not. The language also indicated an autobiographical article by Cher herself by saying "My life, my husbands and my many, many men."

34. Some of the quotations of Cher appearing in the March 17, 1981 and March 24, 1981 issues of the *Star* had already appeared in the March, 1981 issue of *Forum* Magazine, which was published and in circulation before News Group purchased the Interview from Robbins and before publication of the subject articles in the *Star*.

35. In or about November, 1979, News Group had made a proposal to Cher that Cher cooperate with the *Star* in a four or five part exclusive series on her life for payment to Cher of the sum of $100,000. News Group's proposal was rejected by Cher.

36. News Group published its March 17, 1981 and March 24, 1981 issues of the *Star* with actual notice and knowledge of the falsity of their statements and usages, and News Group knew that an "exclusive series" on Cher's life in the *Star* would be, and was, unauthorized by Cher.

37. The usages by News Group in publishing the cover and article in its March 17, 1981 issue and the article in its March 24, 1981 issue of the *Star*, were a willful, knowing and intentional misappropriation of Cher's name and likeness, willful and knowing false statements of facts, and a conscious disregard for the rights of Cher.

38. The manner of selling copies of the *Star* at supermarket checkout stands encourages purchasers to purchase the *Star* in part depending upon the content of the cover. The inducement to purchase the March 17, 1981 issue of the *Star* was dependent in part upon the false impressions generated by the improper usages of Cher's name and photograph, in much the same manner as is an inducement to purchase from an advertisement.

39. The acts of Robbins were a willful, knowing and intentional misappropriation of Cher's name and likeness and a conscious disregard of the rights of Cher.

40. The fair market value of the right to use Cher's name and likeness in the manner in which use was made herein by News Group is $100,000.

41. The uses of Cher's name and likeness by Forum and News Group complained of herein, were solely for purposes of enhancing the sales of *Forum* Magazine and the *Star* respectively, for a commercially exploitive effect, rather than for the purpose of informing the public about a newsworthy event.

42. The words, usages and configurations by Forum, Penthouse and News Group herein, caused actual confusion and caused readers thereof to believe that Cher had given exclusive interviews directly to *Forum* Magazine and to the *Star* and that Cher had endorsed *Forum* Magazine.

43. By virtue of the false impressions created by defendants, Cher was subjected to personal consternation, frustration and humiliation.

44. The following conclusions of law insofar as they may be considered findings of fact are so found by this Court to be true in all respects.

CONCLUSIONS OF LAW

1. This is an action brought within the jurisdiction of this Court pursuant to 28 U.S.C. §§1131, 1338 and 15 U.S.C. §1121, with respect to those claims arising under 15 U.S.C. §1125(a) (The Lanham Act), the doctrine of pendent jurisdiction, and pursuant to 28 U.S.C. §1332 (diversity of citizenship).

2. Other than those claims arising under Federal law, the law of the State of California is applicable herein.

Misappropriation of Right of Publicity

3. The law affords protection to an individual's proprietary interest in his own identity (*Motschenbacher v. R. J. Reynolds Tobacco Company*, 498 F.2d 821, 825 (9th

Cir. 1974)). The right of a person to the use of his name and likeness is a right of value upon which plaintiff can capitalize by selling licenses (*Lugosi v. Universal Pictures*, 25 Cal.3d 813, 819, 160 Cal.Rptr. (1970)).

4. A celebrity or other public figure has the right to control the publicity and establish conditions for the use of his or her name and likeness when he or she chooses voluntarily to give an "exclusive interview" to a particular publication. That celebrity has the right to delineate the conditions and controls over such usage by the publication. Any subsequent usage by the publication, or by a third party who has knowledge of the existence of any such conditions or controls, not in accordance with such delineation, and without the consent of the celebrity, is a wrongful appropriation of the commercial value of the celebrity's identity and right of publicity.

5. The publication of the March, 1981 issue of *Forum* Magazine, and the publication of the Newspaper Advertisement, the Radio Advertisement, the Penthouse Subscription Advertisement and the Forum Subscription Advertisement, constituted a misappropriation of Cher's right of publicity by Forum and Penthouse. Penthouse is liable as a joint tortfeasor with Forum by reason of its direct participation in the preparation and placement of the advertisements, and in publishing the Penthouse Subscription Advertisement knowing it to be false and a misappropriation of Cher's rights.

6. The publication of the March 17, 1981 cover and article and the March 24, 1981 article in the *Star* constituted a misappropriation of Cher's right of publicity by News Group.

7. Robbins is also liable for misappropriation of Cher's right of publicity because the Interview was given to him

in his capacity as an agent of *US* Magazine, with the full knowledge of the exclusiveness of the interview to *US* Magazine. The subsequent usage of such Interview, without Cher's consent, constitutes a misappropriation, and Robbins is liable for the consequences thereof. Robbins is jointly and severally liable with Forum and News Group for the general and special damages assessed against them.

Misappropriation for Advertising

8. In California, the use of a person's name, photograph or likeness for advertising purposes without consent is prohibited by statute and common law (California Civil Code §3344; *Fairfield v. American Photocopy, Etc., Co.*, 138 Cal.App.2d 82, 85, 291 P2d 194 (1955)).

9. The publication of the Newspaper Advertisement, the Radio Advertisement, the Penthouse Subscription Advertisement and the Forum Subscription Advertisement constituted a knowing and willful misappropriation of Cher's name and likeness for advertising purposes by Forum and Penthouse.

10. Such misappropriation exists even if, *arguendo*, the initial cover and article were not unlawful as to Cher. The advertising is not merely "incidental" to the original publication and the express words of endorsement and other usages go much further than establishing the news content and quality of the periodical (*Namath v. Sports Illustrated*, 80 Misc.2d 531, 363 N.Y.S.2d 276 (1975), aff'd 39 N.Y.2d 897, 386 N.Y.S.2d 397 (1976)).

11. By reason of Penthouse's direct participation in the preparation and placement of these advertisements, and by its publication of the Penthouse Subscription Advertisement knowing it to be false and a misappropriation, Penthouse is liable as a joint tortfeasor with Forum. Robbins is liable jointly and severally for the consequences of his acts.

Lanham Act Violations

12. The actions of Forum, Penthouse and News Group constitute violations of Section 43(a) of the Lanham Act. Although Section 43(a) is contained in the Lanham Act, which primarily relates to federally registered trademarks, liability under Section 43(a) may arise for a false description or representation even though no trademark is involved (*Smith v. Montoro,* 648 F.2d 602, 605, fn. 3 (9th Cir. 1981)). Moreover, the names of movie actors and other performers may, under certain circumstances, be registered under the Lanham Act as service marks for entertainment services (See, e.g. *Re Carson,* 197 U.S.P.Q. (BNA) 554.) Although Cher has not alleged that her name is registered as a service mark, registration of a trademark or service mark is not a prerequisite for recovery under Section 43(a) (*Smith, supra.*, 648 F.2d at 605). Additionally, the plaintiff under Section 43(a) need not be in actual competition with the alleged wrongdoer (*Smith, supra.*, 648 F.2d at 607).

13. The Lanham Act extends to misrepresentations in advertising as well as labelling of products and services in commerce (*Benson v. Paul Winley Record Sales Corp.*, 452 F.Supp. 516, 517 (S.D.N.Y. 1978)). The Lanham Act proscribes any false designation or representation in connection with any goods or services in interstate commerce (*Smith v. Montoro, supra.*, 648 F.2d at 604).

14. Penthouse is liable as a joint tortfeasor by virtue of its direct participation in the preparation and placement of the advertisements, and by its publication of the Penthouse Subscription Advertisement knowing it to be false and a misappropriation. Robbins is liable jointly and severally for the consequences of his acts.

Unfair Competition

15. California Business and Professions Code §17200 defines unfair competition as including "unlawful, unfair

or fraudulent business practices and unfair, deceptive, untrue or misleading advertising . . . ." In California, it is also an act of unfair competition for a person to induce the public to purchase a product by making an untrue or misleading statement in any newspaper or other publication (California Business and Professions Code §17500). The California Unfair Competition Law is extremely broad, encompassing any unlawful, unfair or deceptive business practice (*Barquis v. Merchants Collection Assn.*, 7 Cal.3d 94, 111, 101 Cal.Rptr. 745 (1972)).

16. The acts of Forum, Penthouse and News Group constituted acts of unfair competition. Penthouse is liable as a joint tortfeasor by virtue of its direct participation in the preparation and placement of the advertisements, and by publishing the Penthouse Subscription Advertisement knowing it to be false and a misappropriation. Robbins is liable jointly and severally for the consequences of his acts.

Constitutional Privilege

17. In an action for invasion of right of privacy, which depends for its existence upon some element of falsity, a public figure must prove actual malice, that is, knowledge or reckless disregard for the truth, in order to recover against a media defendant (*Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967)). However, where the claim does not depend upon an element of falsity in the sense involved in *Time, Inc. v. Hill*, but is rather an appropriation of name and likeness for commercial purposes, the actual malice standard is not applicable. (*Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977), *National Bank of Commerce v. Shaklee Corp.*, 503 F.Supp. 553, 540 (W.D. Tex. 1980)).

18. The privilege of using a public figure's picture in connection with an item of news does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information (*Ali v. Playgirl*, 447 F.Supp. 723, 727 (S.D.N.Y. 1978)). A person is not stripped of his or her rights merely because he becomes a public figure, and the actual malice requirement does not extend to situations where, as here, the name of a public figure is being used in an exploitative, commercial fashion (*Lerman v. Chuckelberry Pub. Inc.*, 496 F.Supp. 1105, 1110 (S.D.N.Y. 1980)).

19. The rationale for protecting the right of publicity is the straightforward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having defendants get for free some aspect of Cher that has market value and for which they would normally pay (*Zacchini v. Scripps-Howard Broadcasting Co., supra.*, 433 U.S. at 576).

20. Even assuming, *arguendo*, that the actual malice test were applicable herein, and to the extent it may be applicable to the false statements of fact, Cher has satisfied the requirements of that test by establishing the defendants' actual knowledge of the falsity of their statements and usages or reckless disregard for the truth.

Damages

21. Cher is entitled to general, special and exemplary damages, against Robbins, Forum and News Group and to special damages against Penthouse, as well as costs of suit against all defendants.

(a) *General Damages*

22. Defendants Robbins, Forum and News Group are liable for damage to Cher for having falsely stated and having created the wrongful impression in the minds of the

public that Cher gave exclusive interviews to *Forum* Magazine and to the *Star*. Forum is additionally liable for creating the wrongful impression that Cher endorsed *Forum* Magazine.

23. The amount of damages necessary to reasonably compensate Cher for the injury suffered by her as a result of the wrongful, false impressions created by defendants in the mind of the public is within the discretion of this Court. A fair approximation of the measure of damages that would be necessary to conduct a reasonable corrective advertising campaign to inform the public that the usages by defendants were wrongful, and of the true facts. In other cases the court have awarded a sum equal to twenty-five percent of the cost of defendant's wrongful initial advertising (*Big O Tire Dealers v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365, 1374 (10th Cir. 1977)). In this case, the value of Forum's false, misleading and wrongful advertising using Cher's name and likeness, was $276,468 and, thus, an award of $69,117 is appropriate to Cher against Robbins and Forum.

24. The effect of and injury to Cher by the false, misleading and wrongful usage of Cher's name and likeness by News Group is similar to an extensive advertising campaign. Thus, in the Court's discretion, an award of $69,117 is an appropriate measure of general damages against Robbins and News Group.

(b) *Special Damages*

25. Defendants Robbins, Forum, News Group and Penthouse are liable for special damages to Cher for the reasonable value of their wrongful usage of Cher's name and likeness.

26. In the case of the usage by News Group, the value has been established by News Group itself in its prior negotiations with representatives of Cher. Damages for the

value of the usage of Cher's name and likeness against News Group and Robbins are $100,000.

27. Damages against Forum, Penthouse and Robbins for the value of the usage of Cher's name and likeness are $100,000.

(c) *Exemplary Damages*

28. In California, exemplary damages are recoverable for torts where defendant's acts are carried on with a conscious disregard for the rights of plaintiff or by means of an intentional misrepresentation or deceit (California Civil Code §3294).

29. Exemplary damages against Forum shall be in the amount of $100,000, against News Group in the amount of $200,000 and against Robbins in the amount of $25,000.

(d) *Costs of Suit*

30. Cher's awarded costs of suit herein incurred against all defendants.

31. Any conclusions of law contained in the Findings of Fact are incorporated herein by reference.

Let judgment be entered accordingly.

Dated this 15th day of January, 1982 at Los Angeles, California.

[Stamp] MANUEL L. REAL
Manuel L. Real
United States District Judge

APPENDIX C.

Print Advertisements.

EXHIBIT C.

Daily News, Wednesday, February 18, 1981.

[Masthead]

The International Journal of Human Relations.

Cher Never Told Anyone How She Played Kiss and Tell With Rock Star Gene Simmons.

You'll learn news in Forum Magazine that you won't learn anywhere else. That's because 50,000 people a year tell secrets to Forum they can't tell anyone else. People like you. People who want straight answers to questions about living and loving in the eighties. People who dare to discover the truth about why men are staying away from women, what the Woody Allen type has that macho man only dreamed about, and even why Cher doesn't think that being a sex symbol is enough.

In the March Forum, a nationally distinguished panel of experts addresses these and other issues with the frankness they deserve. That's why 3,000,000 people will read it. And that's why people are open with Forum. Why they share with us their deepest secrets and most fascinating stories.

Read Forum. Write to Forum. Forum Listens. Forum Responds.

She Told Forum Magazine.

(Photograph of Cher in original not printed in this brief.)

EXHIBIT D.

There are certain things that Cher won't tell People and would never tell Us.

She tells Forum.

Is there more to stardom than groupies, drugs and casual sex? Find out in the March issue of FORUM, where a ravishing Cher reveals the pleasures and perils of celebrity. What does the first woman to expose her navel on national television have to say about the raucous world of rock and roll? Plenty!

Candid celebrity interviews, expert consultation, and our famous exchange of letters make FORUM the most comprehensive and up-to-date journal of homan relations available today. Uncompromising, always engaging, provocative and informative, FORUM puts you at the forefront of healthy sexuality.

Only in FORUM could Cher tell things that she wouldn't breathe a word of anywhere else. So take a tip from Cher and hundreds of thousands of other adventurous people and subscribe to FORUM. Begin your own correspondence or just keep in the know, by having FORUM delivered to you for only $15! Just fill in the coupon and mail today!

(Photograph of Cher and subscription form in original not printed in this brief.)

EXHIBIT E.

There are certain things that Cher won't tell People and would never tell Us.

She tells Forum.

Is there more to stardom than groupies, drugs, and casual sex? In this issue of FORUM Cher reveals the pleasures and perils of celebrity. What does the first woman to expose her navel on national television have to say about the raucous world of rock and roll? Plenty!

Candid celebrity interviews, expert consultations, and letters make FORUM the most comprehensive and up-to-date journal on human relations. Engaging and always informative, FORUM puts you at the forefront of healthy sexuality.

So join Cher and FORUM's hundreds of thousands of other adventurous readers today. Just fill in the coupon to begin your 1 year subscription for only $15!

(Photograph of Cher and subscription form in original not printed in this brief.)

APPENDIX D.

Radio Advertisement.

[Letterhead]

Tilley, Marlieb & Alan, Inc.

As Recorded Script	Client:	FORUM
Comm. Code#: CFM-0612	Media:	RADIO :60
	Job. No.	RFM-1010
	Date:	2/2/81
	Title:	"COUPLES"

Male VO: We've gotten a lot more open with each other since we started reading Forum Magazine together. Because Forum opens up a dialogue between us and that really helps.

FEMALE VO: . . . And Forum has made us realize that we're not the only ones with tough questions about sensitive subjects. Every month, three million men and women like us find answers to their most intimate questions in Forum Magazine. And more and more couples are reading Forum together, and writing to Forum with personal stories and insights.

MALE VO: I've learned a lot about you and about myself too. Because Forum answers questions I didn't know how to ask before. Questions about health, sex, and the lifestyles of the eighties. And in this month's Forum, how to cope with jealousy, why so many men today are rejecting women and what the Woody Allen type has that the macho man only dreams about . . .

FEMALE VO: All in the March Forum. In Forum's exclusive interview, you'll also find out why Cher doesn't think that being a sex symbol is enough. Not to mention news about a new treatment for arthritis. Forum Magazine.

MALE VO: Read it.

FEMALE VO: Because Forum listens.

MALE VO: Because Forum responds.

APPENDIX E.

Rule 28.1. Designation of Corporate Relationship.

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, following is a listing of the parent companies, subsidiaries and affiliates of petitioners Penthouse International, Ltd. and Forum International, Ltd.:

Boardwalk Properties, Inc.
Bravo International, Ltd.
Evelyn Rainbird, Ltd.
Evelyn Rainbird House Parties, Inc.
FDX Patent Holding Company N.V.
Film Follies, Inc.
Follycons, Inc.
Forum International, Inc.
Minotaur Press, Ltd.
Nova Publications, Ltd.
Omni Accessories, Inc.
Omni Export Corporation
Omni New Frontier Productions, Ltd.
Omni Productions International, Ltd.
Omni Publications International, Ltd.
P-H Construction Corp.
P-H Fine Arts. Ltd.
P.H. Realty Leasing Corp.
Penthouse Atlantic Corporation
Penthouse Book Society, Ltd.
Penthouse Clubs, Ltd.
Penthouse Clubs International, Ltd.
Penthouse Clubs International Establishment
Penthouse Communications, Ltd.
Penthouse Creations, Ltd.
Penthouse Energy Technology Systems, Ltd.
Penthouse Export Corporation

Penthouse Films International, Ltd.
Penthouse Financial Services, N.V.
Penthouse International (California), Ltd.
Penthouse Letters, Ltd.
Penthouse-Lincoln Associates, Ltd.
Penthouse Maintenance & Security Co., Ltd.
Penthouse Music, Ltd.
Penthouse Photo World, Ltd.
Penthouse Poster Press, Ltd.
Penthouse Press, Ltd.

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CLERK

No. 82-1719
IN THE

Supreme Court of the United States

October Term, 1982

FORUM INTERNATIONAL LTD., a New York corporation; and PENTHOUSE INTERNATIONAL, LTD., a New York corporation,

Petitioners,

vs.

CHER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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vs.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The Statement of the Case set forth in Petitioners' Petition is incomplete in that it fails to inform this Court of the language of the advertisements, and the usage of Cher's name and likeness therein, on which the Trial Court and the Ninth Circuit based their decisions. Therefore, this Statement of the Case is necessary.

The Trial Court in this case awarded damages to Petitioner, Cher, for misuse of her name and likeness in advertising, and the Ninth Circuit upheld the full amount of the award. The Ninth Circuit held that the usages of Cher's name and likeness in Petitioners' advertisements supported a finding that the usage was more than a mere "incidental"

usage. (App. pp. 8-10).[1] It held that the usages in question supported findings that, at the very least, they falsely implied an endorsement by Cher of *Forum* magazine, and that they were published with reckless disregard for the truth. (App. pp. 8-10).

The offending advertisements were contained in a series of advertisements encouraging members of the public to purchase *Forum* magazine. They included a newspaper advertisement, two different cut-out subscription advertisements, and a radio advertisement. (App. pp. 15-16).

The advertisements were published by Petitioners against a background of Cher having given an interview to *US* magazine, a rival of *Forum* magazine, which interview was not published (App. p. 14), and *Forum* magazine having purchased the interview from the *US* interviewer. (App. p. 15). Cher had not dealt with *Forum* magazine, had not authorized the publication of the interview by *Forum* magazine, did not endorse *Forum* magazine, and was not a reader of *Forum* magazine. (App. p. 17).

In the newspaper advertisement, published in excess of 100 times in at least 27 newspapers around the United States and Canada, there appeared a prominent photograph[2] of Cher along with the following bold headline and subscript:

> "FORUM
> Cher Never Told Anyone How She Played Kiss and Tell With Rock Star Gene Simmons . . . She Told Forum Magazine." (Trial Court Exhibit 17).[3]

---

[1]All Appendix references are to Petitioners' Petition for Writ of Certiorari on file herein.

[2]The photographs of Cher in each of the advertisements herein were not reproductions of the magazine cover as published, but, rather, were free-standing photographs of Cher.

[3]Trial Court exhibits are not on file with this Court.

The cut-out subscription advertisement published in two issues of *Penthouse* magazine also contained a prominent photograph of Cher with the following bold headline:

> "There are certain things that Cher won't tell People and would never tell Us. She tells Forum." (Trial Court Exhibit 5).

As part of the text of such subscription advertisement, the following language appeared:

> "Only in FORUM could Cher tell things that she wouldn't breathe a word of anywhere else. So take a tip from Cher and hundreds of thousands of other adventurous people and subscribe to FORUM." (Trial Court Exhibit 5).

The cut-out subscription advertisement published in two issues of *Forum* magazine likewise contained a prominent photograph of Cher with the following bold headline:

> "There are certain things that Cher won't tell People and would never tell Us. She tells Forum." (Trial Court Exhibit 18).

As part of the text of the subscription advertisement, the following language appeared:

> "So join Cher and FORUM's hundreds of thousands of other adventurous readers today. Just fill in the coupon to begin your 1 year subscription for only $15!" (Trial Court Exhibit 18).

Finally, the radio advertisement, which was broadcast in excess of 700 times over at least 100 radio stations around the United States (App. p. 16), contained the following statement:

> "In Forum's exclusive interview, you'll also find out why Cher doesn't think that being a sex symbol is enough." (Trial Court Exhibit 6).

None of these advertisements was authorized by Cher, and no representative of Petitioners made any effort whatsoever to seek Cher's permission. (App. p. 15).

Summary of Argument.

Cher's argument herein is that the issue presented is not an important legal or constitutional issue, but rather a factual one. The question is not whether Petitioners are constitutionally privileged to use a person's name and likeness in subscription advertisements which are merely "incidental" to an article about that person. Both the Trial Court and Ninth Circuit assumed that such was the appropriate standard.

However, both lower courts concluded that Petitioners went beyond a mere "incidental" usage and that the usages constituted an endorsement of *Forum* magazine by Cher. Under such facts, a magazine loses its protection. The language of the advertisements, such as "So take a tip from Cher . . . and subscribe to Forum" and "So join Cher and . . . other adventurous readers . . .", is so clearly language of endorsement that the facts of this case do not justify review by this Court.

ARGUMENT FOR NOT GRANTING WRIT.

I.

The Case Presents No Important Questions.

This case presents no novel questions of law or constitutional issues, but rather, it is a simple case of an improper usage of a person's name and photograph for advertising. There is no question that Cher's name and photograph were used in advertisements by Petitioners to solicit subscriptions to *Forum* magazine. Petitioners do not contest this.

Petitioners' argument, rather, is that the usages were merely "incidental" to the article itself and, therefore, permissible. However, the constitutional issue of law of whether a magazine can make such "incidental" usage is not before this Court. Both the Trial Court and the Ninth Circuit assumed that such constitutional protection did, in fact, apply in this case (App. B, p. 22; App. A, p. 8); however, both lower courts concluded that the facts amply justified a finding that the usage went beyond a mere "incidental" usage (*Id.*) and that the advertisements were published with knowledge of the falsity of Cher's endorsement or with reckless disregard for the truth. (App. B, p. 22; App. A, pp. 9-10).

The only real question presented to this Court by Petitioners is whether the facts amount to a mere "incidental" use, or whether they go beyond that and amount to an express or implied endorsement. This factual issue, having been squarely confronted and decided by the Trial Court and the Ninth Circuit, is not the kind of important issue which this Court should undertake to rule upon.

II.

Any Right to Use a Person's Name and Photograph in Incidental Advertising May Be Lost if the Usage Goes Beyond Mere Incidental Usage or Amounts to an Endorsement.

Petitioners cite the case of *Namath v. Sports Illustrated*, 80 Misc.2d 531, 363 N.Y.S.2d 276 (1975), *aff'd*, 39 N.Y.2d 897 (1976), for the proposition that a magazine may use a

person's name and photograph in advertisements for the magazine where it is merely an adjunct to, or is only incidental to, a protected publication about that person in that magazine. However, the language of *Namath* itself makes it clear that such a right is not unlimited:

> "The language of the Namath advertisement relied upon in the dissent does not indicate plaintiff's indorsement of the magazine *Sports Illustrated*. Had that been the situation, a completely different issue would have been presented. Rather, that language merely indicates to the readers of those advertisements, the general nature of the contents of what is likely to be included in future issues of the magazine." (48 App.Div.2d at 488).

Likewise, in *Booth v. Curtis Publishing Co.*, 15 App.Div.2d 343, 223 N.Y.S.2d 737, *aff'd* 11 N.Y.2d 907 (1962), on which the *Namath* Court relied, it was pointed out that, "[E]ssential to the holding is that there was nothing in the reproduction which . . . could reasonably suggest that Miss Booth had indorsed the magazine . . ." (15 App.Div.2d at 350).

The standard in California is reflective of the above language. Civil Code Sec. 3344 prohibits the usage of a person's name, photograph, or likeness in advertising. Subdivision (e) thereof makes it a question of fact as to whether the usage was "so directly connected with the commercial sponsorship or with the paid advertising" as to constitute a violation.

In the present case, both the Trial Court and the Ninth Circuit concluded that the facts presented went beyond a mere description of the content and quality of *Forum* magazine. The Ninth Circuit, for example, pointed out that the language that Cher "tells *Forum*" is patently false, as Cher never "told" *Forum* anything, having given her exclusive

interview in the first instance to *US* magazine. (App. A, p. 8).

Similarly, the language "So take a tip from Cher . . . and subscribe to FORUM" is an express, unequivocal endorsement of *Forum* magazine, prohibited even under the *Namath* case. The same is true with respect to the language "So join Cher and hundreds of thousands of other adventurous readers today." This is also language of express endorsement in that it states that Cher is a reader of *Forum* and that others should join her in subscribing to *Forum* magazine.

The issue of whether or not these usages constitute an endorsement is not even a close one. The language of endorsement is clear on the face of the advertisements. If a court were to hold that such language did not constitute an actionable misappropriation, it would be difficult to imagine any language of endorsement strong enough to withstand the kind of protection proposed here. The effect of such a ruling would be to set aside an entire body of statutory and common law in almost every state protecting a person's right to prevent his or her name from being used as an endorsement for a product without permission.

By way of example, the ruling Petitioners are seeking herein would permit a magazine of the Communist Party to print a truthful article about a non-communist public figure, which it has a constitutional right to do, and then take out advertisements for subscriptions to their magazine using the language "so take a tip from (that person) and subscribe to (the communist magazine)", or "So join (that person) and other readers of (the communist magazine)." Such a ruling by this Court would be extremely dangerous and should not even be considered.

III.
Conclusion.

For the reasons stated herein, it is respectfully requested that this Court deny Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED: May 17, 1983.

Respectfully submitted,

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JOHN D. FORBESS,
RUDIN, RICHMAN & APPEL,
Attorneys for Respondent, Cher.